

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CASIE JO MCGEE and SARAH ELIZABETH
ADKINS; JUSTIN MURDOCK and WILLIAM
GLAVARIS; and NANCY ELIZABETH MICHAEL
and JANE LOUISE FENTON, individually and as next
friends of A.S.M., a minor child;

Plaintiffs,

v.

KAREN S. COLE, in her official capacity as CABEL
COUNTY CLERK; and VERA J. MCCORMICK, in
her official capacity as KANAWHA COUNTY
CLERK;

Defendants,

and

STATE OF WEST VIRGINIA;

Defendant-Intervenor.

No. 3:13-cv-24068

Hon. Robert Chambers

**PLAINTIFFS' REPLY IN OPPOSITION
TO MOTION TO STRIKE OF DEFENDANTS
VERA J. MCCORMICK AND KAREN S. COLE**

On January 3, 2013, Plaintiffs filed a "Notice of Supplemental Authority" (Dkt. 44) to alert the Court to two recent federal court decisions relevant to a claim made by both Defendants McCormick and Cole ("Defendants") in their respective motions to dismiss (Dkt. 26, 27, 31, 32). These recent decisions, *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 20, 2013), and *Obergefell v. Wymyslo*, No. 13-cv-00501-TSB (S.D. Ohio Dec. 23, 2013), were issued after briefing had concluded on Defendant McCormick's motion to dismiss (Dkt. 35). Plaintiffs filed their memorandum in opposition to Defendant Cole's motion to dismiss timely on December 23, 2013, which was the same day as one of the decisions was issued, and a business day after the

issuance of the other, and therefore were unable to incorporate either of them in Plaintiffs' memorandum (Dkt. 37). Defendants are incorrect in arguing that Plaintiffs' Notice of Supplemental Authority and attached cases constitute a "surreply," and therefore Defendants' motion to strike should be denied.

As Defendants acknowledge, no federal or local rule governs submission of supplemental authority in trial courts. In appellate courts, counsel has an obligation to inform the Court of pertinent authority that comes to a party's attention after the party's brief has been filed, and may do so by letter explaining the reasons for the supplemental citations. Fed. R. App. P. 28 (j). Consistent with this principle, trial courts in the Fourth Circuit have held that submission of supplemental material after the close of briefing is permissible. For example, in *Sisk v. Abbott Labs.*, No. 1:11cv159, 2012 WL 1164559, at *1 (W.D.N.C. Apr. 9, 2012), the court held that a plaintiff's submission of supplemental authority was "not a sur-reply; it is a notice of supplemental authority commonly used in the federal court system to alert the Court to a decision of another court issued after the close of the briefing period. . . . To suggest that a party may not file such a notice and inform the Court of subsequent authority is nonsensical." Similarly, in *HSBC Bank USA, Nat'l Ass'n v. Resh*, No. 3:12-cv-00668, 2013 WL 6230670, at *2 (S.D. W. Va. Dec. 2, 2013), a party filed a "supplement" containing a copy of a deposition transcript it did not possess at the time the party had filed its reply brief. This court held that filing the supplement did not violate S.D. W. Va. Local Rule Civ. P. 7.1(a)(7) and treated the supplement "as it would treat a 'notice of additional authority'" because "the supplement merely adds newly-released authority that was not available when the earlier pleadings were filed." Accordingly, Plaintiffs respectfully request that Defendants' Motion To Strike be denied.

Dated: January 6, 2014

Respectfully submitted,

CASIE JO MCGEE and SARAH
ELIZABETH ADKINS, et al.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January 2014, I effected service upon counsel for Defendants by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system, which will cause service on all Defendants and counsel of record.